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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinions of the district court and the Court of Appeals for the Ninth Circuit are set forth in Brief for Petitioners.

JURISDICTION

The jurisdiction of the Court is set forth in Brief for Petitioners.

QUESTION PRESENTED

Whether an action is "commenced" within the meaning of §5(b) of the Clayton Act for purported members of a Sherman Act § 1 class action when the action is filed timely but denied class action status after the date the limitations run?

STATEMENT

The decision of the United States Court of Appeals for the Ninth Circuit is inextricably tied to the peculiar history of Utah's class action and the subsequent applications for intervention filed by Respondent. Much of the procedural history is set forth in the Brief for Petitioners. However, since this is a case of first impression and since the Ninth Circuit carefully restricted its opinion to the facts, it is important to state fully the facts which bring this case before the Court.

On May 13, 1969, the State of Utah filed a complaint in the United States District Court for the District of Utah.[1] The complaint alleges violations of § 1 of the Sherman Antitrust Act[2] and seeks treble damages and injunctive relief arising out of the purchase of concrete and steel pipe. The State of Utah brought the action on behalf of itself and all of its lesser governmental entities who were end users of pipe acquired from the defendants, co-conspirators and others.[3]

In order to give proper perspective to the issues presented for review, it is necessary to briefly recount the chronological history of the federal government's proceedings involving concrete and steel pipe in the Western area. On March 10, 1964, a United

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[1] A. 313.

[2] 15 U.S.C. § 1.

[3] The class alleged in the complaint was also broad enough to include all other states in the "Western Area" as therein defined, which had not previously filed a similar action, including Wyoming, Nevada and Idaho, and including their lesser governmental entities (A. 313, 314, 317).

States Grand Jury in the Southern District of California returned five indictments, each of which named certain individual defendants and two or more corporate defendants, petitioners in the instant case, with the exception of Utah Concrete Pipe Company and W. R. White Company.[4] Each of the indictments charged the defendants named therein with combining and conspiring together in restraint of interstate trade in a specific product line of steel and/or concrete pipe in violation of § 1 of the Sherman Act, in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves. Pleas of *nolo contendere* were accepted by the court on June 19, 1964.[5] Subsequently, the United States filed five civil actions against various of the same corporate defendants. The civil complaints were based on facts uncovered by the Government in preparing its criminal indictments.[6] On October 28, 1964, the Government, seeking to restrain the defendants from continuing violations of § 1 of the Sherman Act[7] amended each of its five complaints by adding a new count pursuant to § 4 of the Sherman Act.[8]

On December 8, 1967, each of the defendants, with the exception of American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were respectively named as defendants.[9] On May 24, 1968, a consent judgment was entered against American Pipe and Construction Company in each of the three government cases in which it had been named as a defendant.[10]

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[4] A. 11, 19, 26, 36, 45.
[5] A. 52—71.
[6] A. 72, 86, 99, 113, 127.
[7] A. 140 158, 176, 195, 214.
[8] 15 U.S.C. § 4.
[9] A. 232, 242, 252, 263, 274.
[10] A. 284, 294, 303.

The instant class action, alleging respondents to be members of the class, was commenced on May 13, 1969, eleven days before the suspension period provided by § 5(b) of the Clayton Act[11] would have expired.[12] On August 28, 1969, pursuant to a motion of a majority of the petitioners, the Judicial Panel on Multidistrict Litigation transferred the Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. §1407.[13] Judge Pence previously presided over approximately 100 civil actions involving about 350 plaintiffs, all arising out of the government proceedings and known as the "West Coast Pipe Cases."[14]

On November 14, 1969, the petitioners moved for an order determining that the action should not be maintained as a class action.[15] The court made a negative determination of the class action, and in so doing stated:

> In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy would not possibly exceed the 350 cases heretofore filed by end users in the other states of the 'Western Area.' From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful. To the contrary, the fact of *joinder and intervention has made the de-*

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[11] 15 U.S.C. § 16(b).

[12] *See* Maricopa County v. American Pipe & Constr. Co., 303 F. Supp. 77 (D. Ariz. 1969, *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

[13] *In re* West of the Rockies Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 508 (J.P.M.L. 1969).

[14] A. 346, 348; Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 18-19 (C.D. Calif. 1969).

[15] A. 341.

> *termination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule* 23(b)(3). (Emphasis added.)[16]

On December 4, 1969, the court entered its order stating that the class action could not be maintained.[17] Eight days later, on December 12, 1969, more than 60 lesser governmental entities of the State of Utah, including respondents, members of the abortive class, filed motions to intervene as plaintiffs.[18] As indicated by the affidavits filed in support of their motion for intervention, the respondents had purchased substantial amounts of said pipe from the petitioners, co-conspirators and others.[19] While several of the respondents were aware of the class action before it was filed,[20] the majority of the respondents could not be said to have knowingly relied upon the State's action. The State of Utah, however, did rely upon the class action as a vehicle through which the claims of all its lesser governmental entities could be presented to the court; and, upon the negative determination of the class, the State took steps to notify these entities which resulted in the motions to intervene.[21]

Following a hearing, the court on March 30, 1970, rendered its opinion on the applications to intervene.[22] In its opinion the court indicated that "the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners'

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[16] A. 353; Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Calif. 1969).

[17] A. 344.

[18] A. 355-360. A supplemental motion to intervene was filed on December 29, 1969, for six additional applicants for intervention, A. 386.

[19] A. 388-428.

[20] A. 412, 413, 416, 418, 419.

[21] A. 430-34, 471-72. One may presume that "class members situated in a given state would prefer to be represented by the attorney general of that jurisdiction." Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 484 (N.D. Ill. 1969).

[22] A. 482; Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Calif. 1970).

complaints."[23] The court then stated that Rule 23 of the Federal Rules of Civil Procedure could not toll the antitrust statutes of limitation by any theory of relation back. Reasoning that §§ 4B[24] and 5(b)[25] of the Clayton Act were substantive in nature, the court concluded:

> . . . that within the statutorily created antitrust universe Section 5(b) cannot be retolled by any Rule to permit relation back to their several causes of action by intervenors attempting to intervene in *either class or non-class actions* filed for violation of the antitrust laws, after the tolling period of Section 5(b) has ended. (Emphasis added.)[26]

The court denied leave to intervene *with relation back* for the purposes of the statute of limitations.[27] The court nevertheless indicated that the respondents' motions to intervene would be granted as to the claims alleged for the four years preceding December 12, 1969, *i.e.*, the period not then barred by § 4B of the Clayton Act.[28]

In order to secure a final order which could be appealed, respondents amended paragraph 24 of their proposed complaint in intervention so as to limit their allegations of conspiracy to a date four years preceding the time of filing.[29] Whereupon, on July 8, 1970, the court entered its findings of fact, conclusions of law and order on the motions to intervene.[30] The court found that the tolling of the statute of limitations, based upon the government proceedings, ceased on May 24, 1969, and that the filing of a class action by the State of Utah, did not bring the

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[23] A. [illegible]3-84; 50 F.R.D. at 101.
[24] 15 U.S.C. § 15b.
[25] 15 U.S.C. § 16(b).
[26] A. 498; 50 F.R.D. at 108.
[27] A. 499; 50 F.R.D. at 108.
[28] A. 502; 50 F.R.D. at 110.
[29] A. 503.
[30] A. 505.

intervenors within the period of limitation. Insofar as any of the proposed causes of action by respondents were based upon the government actions, the court held the same were barred by the applicable statute of limitations. The motions to intervene were denied.

Respondents appealed the trial court's denial of their motions to intervene to the United States Court of Appeals for the Ninth Circuit. In an opinion entered December 11, 1972, the Court of Appeals reversed the District Court.[31] A petition for rehearing was denied,[32] but the earlier opinion was withdrawn and a new opinion entered on January 31, 1973.[33] The Court of Appeals noted that the denial of the class was based on the trial court's conclusion that the suit could best be handled through joinder of the claimants and that the class was not denied for failure to state a claim on behalf of its alleged members nor for lack of standing or for reasons or bad faith or frivolity. The Court of Appeals held that in such circumstances "as to members of the class Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they would be entertained on the merits. The requirements of Section 5(b) were then met."[34]

The matter was ordered remanded to the District Court with instructions that the order be vacated and for furher proceedings upon the motions.[35]

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[31] State of Utah v. American Pipe & Constr. Co., Petitioners' Brief for Certiorari, App. E.

[32] Petitioners' Brief for Certiorari, App. A.

[33] Petitioners' Brief for Cert. App. D.; 473 F.2d 580.

[34] Petitioners' Brief for Cert., App. D at 37-38; 473 F.2d at 584.

[35] Petitioners' Brief for Cert., App. D at 39; 473 F.2d at 584.

SUMMARY OF ARGUMENT

The State of Utah filed a Sherman Act § 1 class action in an attempt to represent not only its own interests but those of its lesser governmental bodies. The trial court determined that the class action could not be maintained since it felt the claims of the alleged members could better be handled through joinder or intervention. The class action complaint was filed timely but denied class action status by the trial court after the limitations period set forth in §5(b) of the Clayton Act had run. Eight days after the entry of the trial court's negative order on the class action, respondents, some 60 members of the abortive class, filed motions to intervene. The trial court then held that the applications for intervention could not be granted since the proposed complaints alleged causes of action which were barred by the statute of limitations. The Court of Appeals for the Ninth Circuit correctly reversed the trial court, holding that under the facts the action was "commenced" within the meaning of § 5(b) and the rights of the absentee plaintiffs were not barred by the statute of limitations.

The Ninth Circuit's decision is consistent with those of other courts considering the application of § 5(b) to an absentee member of a class. This is true both as to cases dealing with amended Rule 23 and as to those involving the effect of spurious class actions under old Rule 23. The Ninth Circuit had no doubt that respondents' claims would satisfy § 5(b) if the action had proceeded as a class action. It held that the rule was the same in the instant case even though the class action was negatively determined by the trial court.

The Ninth Circuit's decision is carefully restricted to the facts of the case, of which the most important facts concern the reasons the trial court determined that the class action could not

be maintained. Maintenance of the class action was denied because the trial court felt that the class action device was inferior to other available methods for the fair and efficient adjudication of the controversy. The Court of Appeals observed that maintenance of the class action was not denied for failure to state a claim on behalf of the members nor for lack of standing of the representative, nor for reasons of bad faith or frivolity. It was denied because the trial court felt that the claims could more efficiently be entertained through joinder of the claimants rather than by class treatment. Under these circumstances, the Ninth Circuit held that as to the members which Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. Respondents' claims were then before the court, and the only question was as to the manner in which they should be entertained on the merits.

The effect of a negative determination of a class action insofar as a statute of limitations is concerned must be decided by reference to the laws governing the specific statute as they apply in a particular context. The decision of the Ninth Circuit is consistent with the plain meaning of § 5(b) and the liberal construction which this Court has placed upon the antitrust statute of limitations. It is equally consistent with the purpose and intent of Rule 23. The commencement of the Sherman Act § 1 class action halts the running of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class action pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene. This is particularly so when, as in the instant case, the reason for the trial court's negative determination under Rule 23 is its preference to handle the matter through intervention.

This case does not involve a question of abuse of discretion. From its opinion it is clear that the trial court was prepared to allow the respondents to intervene so as to allege claims which, in its mind, were not barred by the statute of limitations. The trial court did not deny intervention as an exercise of its discretion. Rather, intervention was denied because of the court's holding as to the statute of limitations. The decision of the Court of Appeals represents a wise adjudication based upon proper policy considerations. It recognized the inconsistency in the decisions of the trial court, and, in effect, held that the trial court could not deny class action status to the case and then refuse to grant timely applications for intervention which the court itself had invited. A contrary decision would put § 5(b) entirely within the discretion of the trial judge. The trial court could, through a discretionary determination of whether the suit had been commenced or not render the statute of limitations applicable or not. The Ninth Circuit felt that such questions should be resolved by rule of law rather than exercise of discretion. The Court of Appeals correctly held that members of a class in respondents' position had satisfied the statute when the class action was filed. If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed, because the trial court in its discretion wanted the claims presented in a different form of proceeding, it could not be said that the respondents were then never before the court but only that they were out of court again in exactly the same position as when the class action was filed. The decision of the Court of Appeals is correct and should be affirmed.

ARGUMENT

I

RESPONDENTS ARE ENTITLED TO THE BENEFIT OF THE DATE OF THE COMMENCEMENT OF THE CLASS ACTION FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

The question before the Court is whether intervenors who are members of an abortive class are entitled to the benefits of the date of the commencement of a Sherman Act § 1 class action for purposes of the statute of limitations. It is a question of first impression involving the relationship between § 5(b) of the Clayton Act and Rule 23 of the Federal Rules of Civil Procedure. Specifically the court must decide whether an action is "commenced" within the meaning of § 5(b) as to absentee plaintiffs when a class action complaint is filed timely but denied class action status by the trial court after the limitations period has run.[36]

Petitioners lament the decision of the Ninth Circuit as an abridgement, enlargement or modification of the substantive barring provisions of § 5(b). They go to great lengths to demonstrate what they conceive to be the illogic of the Ninth Circuit opinion. In this regard, petitioners erroneously construe the facts of this case. Petitioners have argumentatively suggested many of the difficulties inherent in the application of an arbitrary rule in this area. However, law is not an abstract proposition; it grows and develops through a process of applying legal theories

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[36] The proviso of § 5(b) reads as follows:

Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless *commenced* either within the period of suspension or within four years after the cause of action accrued. (Emphasis added.) 15 U.S.C. § 16(b) (§ 5(b) of the Clayton Act.)

to the operative facts of individual cases. It is the sum total of judicial attempts to reach wise and just decisions in the light of the circumstances of particular cases.[37]

In order to reach a wise and just decision in the instant case, it is necessary to consider the facts carefully, and in light of the circumstances weigh competing principles in order to give effect to the broad policy considerations upon which they are based. On one hand we have a statute wherein Congress determined that whenever the running of the statute of limitations in any case such as this is suspended by prior governmental action, any action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued. On the other hand we have Rule 23 of the Federal Rules of Civil Procedure, a rule designated to facilitate adjudication of numerous claims with judicial economy. It is then necessary to construe § 5(b) vis-a-vis Rule 23 in the light of the facts of this action.

In the instant case the class action complaint, alleging violations that accrued more than four years previously, was filed 11 days before the suspension period by § 5(b) would have expired. There is no question that the complaint was timely insofar as the State of Utah, the named plaintiff and representative party, is concerned. The State's case is still pending before the trial court in the course of discovery. The question before this Court

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[37] As Justice Holmes observed:

> It is something to show that the consistency of the system requires a particular result, but it is not all. *The life of the law has not been logic: it has been Experience.* The felt necessities of the time, the prevalent moral and political theories, institutions of public policies, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed . . . *The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient;* but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. (Emphasis added.) Holmes, The Common Law 1 (1881).

involves the rights of the respondents,[38] purported members of that class action.

A. Rule 23 — The Rights of Class Members.

Rule 23 requires that any judgment in a class action, whether or not favorable to the class, shall include all of those plaintiffs whom the court finds to be members of the class.[39] The underlying policy of the rule is to provide a judicial vehicle to handle claims so numerous that joinder is impracticable.

If a class aciton is filed and subsequently maintained as such, the rights of all members not opting out are protected. As indicated by the Court of Appeals in the instant case: "If the action had proceeded as a class action, we have no doubt that [respondents'] claims would satisfy Section 5(b)."[40] The Ninth Circuit held that the rule was the same in the instant case, even though the class action was negatively determined by the trial court.[41]

This is consistent with the decisions of other courts considering the application of § 5(b) to an absentee member of a class. In *Minnesota v. United States Steel Corp.*,[42] the court stated as follows:

> The court holds and orders that all of these suits may be maintained as class actions and that the filing of these actions tolls the statute of limitations as to absentee plaintiffs, or, put another way, those eligible entities who chose [sic] to join the class in the manner hereinafter prescribed

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[38] These persons may be described as "absentee plaintiffs," "members of an abortive class," or "former members of a class action which the trial court determined could not be maintained as such."

[39] F. R. Civ. P. 23(c) (3).

[40] Petitioners' Brief for Certiorari, App. D at 36; 473 F.2d 583.

[41] See *Esplin v. Hirschi*, 402 F.2d 54 (10th Cir. 1968).

[42] 44 F.R.D. 559 (D. Minn. 1968).

> may date themselves back for purposes of the statute of limitations to the date of the filing of the class action which they join.[43]

The Ninth Circuit correctly held the rule to be the same even though the class action is negatively determined.

Section 4B and the present form of § 5(b) were added to the Clayton Act in 1955. Six years later the Court of Appeals for the Tenth Circuit decided *Union Carbide & Carbon Corp. v. Nisley.*[44] That case involved a question concerning the application of § 5(b) to the commencement of a spurious class action under the old Rule 23. The defendants there, as in the instant case, argued, *inter alia,* that the statute of limitations had run as to class members who were not parties actually before the court. They contended that the filing of the spurious class action served to toll the statute only in favor of the named plaintiffs and that each class member had to appear and assert his claim before the expiration to the statutory period. The court had already determined that the unnamed plaintiffs could intervene after rendition of the verdict in order to claim the benefits of a favorable judgment.[45] In answer to the statute of limitations contention, Judge Murrah stated:

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[43] The court in the *Minnesota* case based its conclusion upon these considerations:

> (1) the only reported decision found to date under the new Rule 23 held the statutory period tolled under very similar circumstances; (2) the vast majority of pre-amendment Rule 23 cases established the propriety of tolling in 'spurious' class actions; and (3) policy considerations inherent in Section 5(b), plus the changes wrought by new Rule 23(b)(3), demand that tolling be permitted. 44 F.R.D. at 565.

[44] 300 F.2d 561 (10th Cir. 1961), *cert. dismissed, sub nom.,* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962).

[45] The spurious class action authorities were divided as to the particular point in the action when intervention was to be cut off. In *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir. 1944 *rev'd on other grounds,* 326 U.S. 99 (1945), Judge Frank suggested that spurious class members be allowed to intervene even after the matter had been decided and for a reasonable time prior to the entry of a final judgment. This theory was followed by the Tenth Circuit in *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561, 589 (10th Cir. 1962).

> If, however, the unnamed plaintiffs are to be accorded the benefits of the judgment, it must be said that the running of the statute of limitations is tolled by the *commencement* of the suit. [Cases cited] If a class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute. This would only serve to 'convert the rule into a trap' for those who have expeditiously allowed their rights to be maintained by a class action.[46] (Emphasis added.)

The respondents, as members of an abortive class, are in a position similar to absentee plaintiffs who sought to intervene in spurious class actions under old Rule 23. Such a proceeding was really not a class action at all.[47] The decree in a spurious class action was not binding on the entire class, but merely a procedural device, an invitation for permissive joinder. If the filing of a spurious class action under old Rule 23 "commenced" an action as to the unnamed and absent plaintiffs within the meaning of § 5(b),[48] the filing of the class action complaint in the instant case under new Rule 23, which makes the judgment binding on all members, should certainly suffice.[49]

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[46] 300 F.2d at 589-90.

[47] See 3B J. Moore, Federal Practice, ¶23.11(3) at 23-2851 to 2857 (2nd ed. 1969).

[48] Prior to the amendment of Rule 23 of the Federal Rules of Civil Procedure in 1966, a majority of the courts passing upon the question concluded that the commencement of a spurious class action tolled the applicable statute of limitations for the benefit of absentee plaintiffs. *See e.g.*, Escot v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965), *cert. denied*, 382 U.S. 814 (1966) (securities); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed, sub nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962) (antitrust); *see also* 3B J. Moore, *supra* note 47. Also persuasive is the rationale of the Fair Labor Standards Act cases which allowed intervention to relate back to the filing date on the theory that there was a "community of interest" shown by the claims. *See e.g.*, Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1945); Kam Koon Won v. Black, 75 F. Supp. 553 (D. Hawaii 1948); Wright v. United States Rubber Co., 69 F. Supp. 621 (S.D. Iowa 1946).

[49] Under amended Rule 23, the members of the class who do not exclude themselves are bound by res judicata. The cases involving statute of limitations questions and the new rule thus far have involved situations where the class action has been upheld and the court has determined that the suit could be maintained as such. Under these circumstances, the commencement of a class action has been

The Tenth Circuit has already indicated that the rule in that circuit is the same under amended Rule 23; that is, the commencement of a class action halts the running of the statute of limitations as against all members of the class.[80] In *Esplin v. Hirschi,* the Tenth Circuit reversed the trial court's holding that a securities case could not be maintained as a class action. In so doing, Judge Hill stated:

> In holding that the class action should have been allowed, it becomes necessary to comment briefly on the effect of this upon the statute of limitations issue. This court has held that the commencement of a spurious class action halts the running of the statute as against all members of the class. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1962). *The same will be true under newly amended Rule 23.* Hence, the rights of the class members are to be determined as if the class action had been allowed instead of being incorrectly terminated below. *This means that the status of class members is to be determined by relation back to the date of the initiation of this suit . . .*[81] (Emphasis added.)

The Ninth Circuit's holding is consistent with the policy underlying Rule 23. If a class action is maintained, then the rule provides for notice to the class members.[82] Those members, however, need never plead as individuals since any judgment will include all members "who do not request exclusion."[83] In other

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held to toll the statute of limitations as to absentee plaintiffs. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 565, 573 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1967). *See* 3B J. Moore, *supra* note 47, ¶23.90(3).

[80] Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

[81] 402 F.2d at 101, n. 14.

[82] Rule 23(c) (1) provides:
"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

[83] F. R. Civ. P. 23 (c) (3).

words a passive class member previously unaware of the action is nevertheless protected by the filing of the class action and will be bound by any judgment in the case unless he specifically requests exclusion from the class.

The commencement of the class action "creates" a class action which exists until and unless the court determines it cannot be so maintained.[54] The trial court's notion in the instant case that a negative determination wipes away the class action as if it never existed[55] is a confusing and needless fiction. At the time the complaint was filed there was a bona fide class. The State of Utah was attempting to represent both itself and all of its lesser governmental bodies. It is difficult to imagine a better example of a proper class. The fact that some 60 members of the "nonclass" applied to the court for intervention only eight days after the negative determination indicates that there was a very real class of absent plaintiffs in need of representation. Under Rule 23(e) the action could not have been dismissed or compromised without approval of the court and notice to the members of the entry of a negative order. The fact is, the class action did exist. It may exist again upon amendment by the trial court or the transferor court (the District of Utah) or upon a contrary ruling by an appellate court.[56]

Moreover, the defendants in the instant case are not prejudiced. The filing of the action as a class action gave them the same notice that other parties plaintiff would be involved[57] as is given to defendants opposing a maintained class of plaintiffs. Accordingly, the decision of the Court of Appeals in this case should not be considered apart from those cases allowing inter-

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[54] F. R. Civ. P. 23(e).

[55] A. 489-99, 50 F.R.D. at 108.

[56] *See* Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

[57] *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 575 (D. Minn. 1968); Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1945).

vention by members of a maintained class after the statute of limitations has run. The only criterion under Rule 23 that distinguishes respondents from members of a maintained class is that their number was thought to be so few as to make joinder and intervention a practicable method of litigating their claims.[58] The trial court made clear in its opinion that respondents met the prerequisites of Rule 23 that go to the relationship between class members and defendants or the representative parties.[59] The only "deficiency" under Rule 23, then, did not pertain to provisions of the Rule that might affect the substantive rights of the defendants. With respect to the defendants, the applicants for intervention stood in exactly the same position as would members of a maintained class. It is only in terms of the procedure desired by the court that the applicants differed from a maintainable class.

Viewed in the perspective of its subsequent denial of respondents' motions to intervene, the trial court's ruling in regard to Rule 23 served to "convert the rule into a trap" for respondents.[60] To compel the members of a class to determine *ab initio* whether the court at some later date might determine that the class action could not be mainained would impose an impossible burden upon them. Such an interpretation would be contrary to the strong antitrust policy favoring civil recovery by damaged parties from proven violations of the antitrust laws[61] and the judicial policy favoring the maintenance of class actions in appropriate cases.[62] The running of the statute should not be

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[58] F. R. Civ. P. 23(a) (1).

[59] F. R. Civ. P. 23(a) (2), (3) and (4); *see* A. 350-53; 49 F.R.D. at 20-21.

[60] Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1962); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd. on other grounds* 326 U.S. 99 (1945).

[61] *Cf.* Deckert v. Independence Shares Corp., 39 F. Supp. 592, 597 (E. D. Pa. 1941).

[62] *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 490 (N.D. Ill. 1969).

made to turn on whether the representative plaintiff is successful is convincing the court that the class action should be maintained.[63]

B. *The Reasons for Denying Class Action Status to a Case Must Be Considered.*

Perhaps the most important part of the instant case concerns the reasons the trial court determined that the class action could not be maintained. As the Ninth Circuit observed, the maintenance of the class action was denied because the trial court felt that the class action device was inferior to other available methods for the fair and efficient adjudication of the controversy. The Court of Appeals stated as follows:

> Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy), not for lack of standing of the representative, or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.
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> Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of §5(b) were then met.[64]

In its opinion the trial court indicated that the class alleged by Utah could not possibly exceed the 350 cases which the court had previously disposed of through joinder. Judge Pence could not conclude that a class action in the instant case would achieve

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[63] *Cf.* Leh v. General Petroleum Corp., 382 U.S. 54, 65 (1965).

[64] Petitioners' Brief for Certiorari, App. D at 37-38; 473 F.2d at 584.

economics of time, effort and expenses or promote any more uniformity of decision than the joinder method which he had utilized in the West Coast Pipe Cases. He stated:

> To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).[65]

The trial court then determined that the action could not be maintained as a class action since the court, as a matter of judicial administration, preferred to handle the claims through joinder of any additional claims. Consistent with these findings, the trial court could not deny the motions to intervene, which it had in fact invited, on grounds that permissive intervention would unduly delay the adjudication of the rights of the original parties. However, the court reached the same result by denying leave to intervene *with relation back* of respondents' proposed actions to May 13, 1969 *because it believed such actions were barred by the statute of limitations.*[66] The trial court acknowledged the respondents as parties before the court as to the claims alleged for the four years preceding December 12, 1969 when the motions to intervene were filed. As to those claims, Judge Pence stated, "This could not now dismiss their complaints."[67]

The Ninth Circuit, in reversing the district court, indicated that it did not lie within the discretionary province of the trial court to deprive respondents of the eleven days balance of time remaining to them under § 5(b). It suggested that if the trial judge, through legal fiction, projects his order denying the class

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[65] A. 353, State of Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C. D. Calif. 1969).

[66] A. 498-99, 50 F.R.D. at 108.

[67] A. 502; 50 F.R.D. at 110.

action backward in time to the date the class action was filed, he must fictionally carry backward with it the class members to whom it was directed and the rights they possess. In this connection the Court of Appeals stated as follows:

> Suit having been commenced by a filing of the complaint, members of the class were safely in court and their claims protected against the bar of §5(b) until, by order of the court, they were ejected from the suit. The statute thus was tolled by commencement of suit and did not again commence to run until entry of the order denying class action.[68]

Petitioners criticize this as a rule which will promote great mischiefs in the future. One example suggested is the application of this rule to the factual situation in *Eisen v. Carlisle & Jacquelin*.[69] In *Eisen* over six million odd-lot stock buyers were potential members of the class. The Second Circuit found it impossible to devise a fair method of giving notice to the members, and accordingly, dismissed the action as "unmanageable." In Utah's purported class there was no question that the representative party could notify and otherwise fairly represent the members of the class. Utah's suit was denied class action status not because it was unmanageable, but because it was too manageable — all of its members could be brought before the court by joinder.

To paraphrase the Advisory Committee's comment in its note to subdivision (c) (1) of Rule 23, the effect of a negative determination of a class action insofar as a statute of limitations is concerned must be decided by reference to the laws governing the specific statute as they apply in a particular context.[70] As we

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[68] Petitioners' Brief for Certiorari, App. D. at 39; 473 F.2d at 584.

[69] 1973 Trade Cas. ¶ 74,476 (2d Cir. 1973).

[70] *See* 3B J. Moore, *supra* note 47, ¶23.90(3) at 23.1653. The Advisory Committee briefly considered such a possibility in its note to subdivision (c) (1) of Rule 23. The committee reviewed the wide discretion granted a trial court in connection with giving notice in a class action and stated as follows concerning a negative determination: [This footnote continued on next page]

have stated, the reasons for determining that the class action should not be maintained are important. The nature of the class and the composition of its members, vis-a-vis the representative party are important. The time frame within which motions to intervene are filed is important. Respondents filed their motions to intervene as plaintiffs eight days after the trial court entered its order that the action should not be maintained as a class action. Certainly said motions were filed within a reasonable time after the court's order and were timely for purposes of intervention. As applied to the instant case, the Ninth Circuit's rule is reasonable and represents the logical articulation of a just decision under the circumstances.

Petitioners' fears concerning the application of such a rule to cases such as *Eisen* are also allayed by reference to Rule 24(b) of the Federal Rules of Civil Procedure and the factors the court must consider in exercising its discretion. Certainly six million intervenors could unduly delay or prejudice the adjudication of the rights of the original parties. In the instant case, however, the trial court effectively exercised his discretion in favor of the intervention *which he had invited* and indicated that permissive intervention would be granted except for claims arising during the period he deemed barred by the statute of limitations.

C. *The Particular Statute of Limitations and Its Underlying Policy Must Be Considered.*

Another important consideration in determining the effect of the trial court's decision under Rule 23 is the particular statute

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A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass actions shall be permitted to claim 'ancillary' jurisdiction or the benefit of the date of the commencement of the action for purposes of statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts. *Committee Note to Rule* 23(c) (1), 39 F.R.D. 99, 104 (1966).

of limitations, the context within which it appears, and the policy upon which it is based. In order to avoid the bar of the statute, § 5(b) requires an action to be "commenced" within the period of suspension or within four years after it accrues. The Court of Appeals found no conflict between § 5(b) of the Clayton Act and Rule 23 since it held that the instant lawsuit "was commenced by Utah eleven days before the running of the statute."[71] In other words, under the facts the action was "commenced" within the meaning of § 5(b), and the rights of the absentee plaintiffs were not barred by the statute of limitations. In prior decisions this Court has liberally interpreted § 5(b) of the Clayton Act. In *Leh v. General Petroleum Corp.*,[72] the Court cautioned against "a niggardly construction of the statutory language" of §5(b). Again, in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,[73] the Court observed that "In 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions." The expanding judicial construction of the antitrust statute of limitations is detailed by Judge Pence in his scholarly opinion in *Maricopa County v. American Pipe & Constr. Co.*[74] In view of the liberal interpretation which this Court has placed upon §5(b), based on the broad policy considerations underlying the Clayton Act,[75] we submit that the decision of the Ninth Circuit in the instant case was clearly correct. The commencement of a Sherman Act §1 class action halts the running

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[71] Petitioners' Brief for Certiorari, App. D, at 36; 473 F.2d at 583.

[72] 382 U.S. 54, 59 (1965).

[73] 381 U.S. 311 (1965).

[74] 303 F. Supp. 77 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

[75] This Court has made it clear that § 5(b) must be interpreted broadly in order to effectuate the belief of Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene. This is particularly so when, as in the instant case, the reason for the trial court's negative determination under Rule 23 is its preference to handle the matter through joinder and intevention.

D. The Ninth Circuit's Decision Does Not Prejudice Petitioners' Substantive Rights.

In its opinion on the motions to intervene, the trial court indicated a belief that the commencement of a class action under Rule 23 could not have the effect of further extending the tolling period specified by § 5(b) of the Clayton Act.[76] This opinion was based on the belief that defendants in an antitrust case are granted a substantive right by the statute "viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23. . . ."[77] Reasoning that § 5(b) created a ***substantive*** right, and relying on the rationale of *The Harrisburg*,[78] the trial court held that the statute of limitations could not be tolled by judicial interpretation of the *procedural* Rule 23.

This substance-procedure dichotomy as applied by the trial court has been limited by this Court to cases involving conflicts of law. In *Burnett v. New York Central Railroad Co.*,[79] Justice Goldberg stated:

> "The distinction between substantive and procedural statutes of limitations appears to have arisen in cases involving conflicts of laws, see The Harrisburg, 119 U.S.

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[76] A. 497-98; 50 F.R.D. at 108.
[77] A. 497; 50 F.R.D. at 108.
[78] 119 U.S. 199 (1886).
[79] 380 U.S. 424 (1965).

> 199; . . . While the embodiment of a limitation provision in the statute creating the right it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, *the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled.* Thus the "substantive — procedural" distinction would seem to be of little help in deciding questions of extending the limitation period. See Glus v. Brooklyn Eastern Terminal, 359 U.S. 231. . . .[80] (Emphasis added.)

Justice Goldberg stated further:

> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.[81]

The courts dealing with appeals in the electrical cases were met with a similar question concerning § 4B of the Clayton Act.[82] The question in those cases was whether fraudulent concealment tolled the four-year statute of limitations contained in § 4B. The first and most complete opinion was that of the Eighth Circuit in *Kansas City, Missouri v. Federal Pacific Electric Co.*[83] There the court was persuaded that § 4B was a procedural statute. In this regard the court stated:

> We are strongly impressed with the assertion that the statute is procedural. The very fact that the limitation period was added 41 years after the enactment of the Clayton Act is indicative that § 4B was not part of the legislative scheme creating a right.[84]

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[80] *Id.* at 427, n. 2.

[81] *Id.* at 427.

[82] Kansas City, Missouri v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 371 U.S. 912 (1962); Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962); Public Service Co. of New Mexico v. General Elec. Co., 315 F.2d 306 (10th Cir. 1963), *cert. denied,* 374 U.S. 809 (1963).

[83] 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 371 U.S. 912 (1962).

[84] *Id.* at 282.

In further support of this position, the court quoted from a discussion on the floor of the House of Representatives as to the effect the statute would have upon pending suits:

> Mr. Murray of Illinois: Then am I correct in assuming that this limitation provided by this amendment is strictly a *procedural* limitation and has nothing to do with substance?
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> Mr. Quigley, a member of the House Judiciary Committee: It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a *procedural* change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose.[85] (Emphasis added.)

Irrespective of the procedural-substantive question, the court in the *Kansas City* case felt that congressional intent, as evidenced by legislative history, required the doctrine of fraudulent concealment to be read into § 4B.[86]

While the procedural-substantive discussion in *Kansas City* pertains to § 4B of the Clayton Act, the same conclusions may be drawn as to § 5(b) since the proviso sentence of that section was added by amendment in 1955, contemporaneous to the enactment of § 4B. To paraphrase the court in *Kansas City*, it is difficult to characterize a proviso added forty-one years after the enactment of the Clayton Act as part of a legislative scheme creating a substantive right. To state that defendants in an antirust case have a substantive right, "viz., the right to interpose the bar of limitations to attempted tolling of §5(b) by Rule 23. ..."[87] is a circuitous means of begging the question. Judge Pence's decision in the instant case is an anachronism. An analytical inquiry

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[85] 310 F.2d at 282-283, *quoting from* 101 Cong. Rec. 5131 (1955).

[86] 310 F.2d at 283.

[87] A. 497, 50 F.R.D. at 108.

as to whether § 5(b) is procedural or substantive does nothing but confuse the question. If members of a valid class have their action commenced when the class action is filed, while members of a failed class are never before the court when the class is denied after the period of suspension has ended, then *either* determination under Rule 23 affects the "substantive" right of the parties. The time after which a defendant is protected by the time bar depends directly on a determination made under the Rules of Civil Procedure. The trial court reached the same result concerning the substantive-procedural dichotomy that it sought to avoid by denying the applications for intervention. It is impossible to avoid such contradictions if the procedure-substance classification is made to bear the burdens that should properly be placed on considerations of policy and fairness. In this case the contradiction is compounded, for in arrogating the statute of limitations to its discretion, the trial court removed a "substantive" right from the certainty of both the statutes and the Rules, and left it to be abridged or enlarged in the discretion of the court.

E. The Purposes and Policy of Rule 23 Must Be Considered.

As the trial court below indicated, its opinion would apply to members of a maintained class. In other words, all members would be required to individually protect their right as against § 5(b) by complying with Rule 8 of the Federal Rules of Civil Procedure.[88] In their brief, petitioners argue that this Court should so limit Rule 23.[89] To reverse the Ninth Circuit and affirm Judge Pence, the Court must be prepared to state that Rule 23 is largely inapplicable and virtually useless in antitrust cases. Since under Rule 23 members are not required to intervene,

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[88] A. 497. 50 F.R.D. at 108. *See* F. R. Civ. P. 8.

[89] Brief for Petitioners at 37-38.

if they do not opt out of the class, they are bound by the judgment whether it is favorable or not.[90] In view of the time usually required for such litigation, it would be rare indeed for an antitrust class action filed within the suspension period provided by § 5(b) to be concluded prior to the time that period runs. There thus develops a direct conflict between Rule 23 and the trial court's rule. If a class member did not opt out, Rule 23 would allow him the benefit of the judgment. However, if during the pendency of the case the statute or tolling provision has run and a class member has not affirmatively intervened, the trial court and the petitioners herein would bar his recovery on the judgment. The holding of the trial court in the instant case was bad law. It thwarted the policy of the Clayton Act and the purpose of Rule 23. Rule 23 was amended specifically to remove any requirement of intervention.[91] The trial court's decision would emasculate that amendment.

To nullify Rule 23 as to the majority of antitrust actions would be a backward step of appalling proportions. It would, in fact, undo much of what has been accomplished procedurally since the confusion engendered by the electrical cases. The Ninth Circuit properly recognized that such a drastic result was not required by the plain meaning of § 5(b) of the Clayton Act, congressional intent or the current trend of judicial decisions, including the interpretations placed upon that section by this Court.[92]

The decision of the Ninth Circuit was correct. The class action in the instant case was *commenced* within the period of suspension provided by § 5(b) of the Clayton Act. In view of

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[90] F. R. Civ. P. 23(c) (2).

[91] *Committee Note to Rule* 23, 39 F.R.D. 98-99, 105-06 (1966).

[92] Petitioners' Brief of Certiorari, App. D. at 3739; 473 F.2d at 583-84.

broad policies underlying the Clayton Act and the liberal interpretation afforded § 5(b) by this Court, the respondents should be entitled to the benefit of the date of the commencement of the class acion insofar as the statute of limitations is concerned.

II

THIS CASE DOES NOT INVOLVE AN ABUSE OF DISCRETION QUESTION.

The Court of Appeals was not faced with an abuse of discretion question. From its opinion it is clear that the lower court was prepared to allow the respondents to intervene so as to allege claims which in its mind were not barred by the statute of limitations; that is, those claims still within the four years provided by § 4B of the Clayton Act:[93]

> As the pleadings now stand, since petitioners have alleged a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore, as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases.[94]

The trial court did not deny intervention as an exercise of its discretion; rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it. The problems of abuse of discretion and possible conflicts arising therefrom are illusory. How-

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[93] 15 U.S.C. § 15b.

[94] A. 502; 50 F.R.D. at 110.

ever, if the trial court had exercised its discretion against the intervention invited by its opinion on the class action,[95] it would most certainly have committed an abuse of discretion.

The question presented to the Court of Appeals was narrower than that presented in appeals attacking denial of intervention for more general reasons. The posture of this case was similar to that of *Brotherhood of Locomotive Firemen & Enginemen v. United States, ex rel. Deavers.*[96]

In refusing to allow intervention in the instant case the trial judge made reference to prejudice which might occur if intervention were allowed..[97] In the context of Rule 24(b),[98] a trial judge ruling on a motion to intervene must consider whether "intervention will unduly delay or prejudice the rights of the original parties."[99] However, in this case the trial judge's reference to prejudice was addressed to the question of whether petitioners were entitled to assert the statute of limitations to bar respondents' motion to intervene. In resolving this question it can hardly be said that the trial judge engaged in an exercise of discretion. First, in reaching his decision he did not

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[95] A. 352-53; 49 F.R.D. at 21.

[96] 183 F.2d 65 (5th Cir. 1950). In *Deavers* the Court of Appeals in a previous opinion in the same case had stated, by way of dictum, that no other parties were necessary to adjudicate the matter at issue. *United States ex rel. Deavers v. Missouri, K. & T. R. Co.*, 171 F.2d 961 (5th Cir.), *cert. denied* 337 U.S. 958 (1949). On remand another party sought to intervene, and upon denial of intervention the case once again reached the Court of Appeals. In reversing the order denying intervention, the court stated:

> Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene, but in this instance the court below was clearly disposed to grant the intervention, and only refused to do so because of some of the language used by the writer of the former opinion. In these circumstances, we think the appeal should be granted, and the order denying intervention reversed. The orders appealed from are reversed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion. 183 F.2d at 67.

[97] A. 486; 50 F.R.D. at 102.

[98] F. R. Civ. P. 24(b).

[99] *Id.*

place significant reliance upon facts peculiar to the parties and the subject matter — factors which usually influence a discretionary ruling.[100] Further, it would be an incongruous use of discretion for a trial judge first to deny a class action because of a preference for joinder and then deny joint intervention to members of the class. Without any use of discretion, the trial judge in this case simply formulated a legal theory by which he disposed of the intervention question. He rejected a prior line of cases employing a "balancing of interests" approach to conflicts between the Federal Rules of Civil Procedure and § 5(b)[101] and adopted an interpretation of 28 U.S.C. § 2072 that would bar any consideration of the effect of the class action.[102] The Ninth Circuit properly recognized that the ruling by the district court was not a matter of discretion, but an erroneous postulate of law, and it reversed.

III

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND REPRESENTS A WISE ADJUDICATION BASED UPON PROPER POLICY CONSIDERATIONS AND PRINCIPLES OF DUE PROCESS.

The decision of the Ninth Circuit does justice in an area of confusing and competing policy considerations. The Court of Appeals recognized the patent inconsistency in the decisions of the trial court. The State of Utah filed a class action in an attempt to represent not only its own interests but those of its lesser governmental bodies.[103] The trial court determined that the class action could not be maintained since it felt the action could be better handled through joinder or intervention. Upon the filing

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[100] *See* 3B J. Moore, Federal Practice ¶¶24.10(4), 24.13 (2d Ed. 1969).
[101] A. 486-88; 50 F.R.D. at 102-03.
[102] A. 493-98; 50 F.R.D. at 105-08.
[103] A. 313.

of motions to intervene by the purported class members, the trial court then held that the applications could not be granted since they were barred by the statute of limitations. The trial court's ruling not only exalts form over substance, it denies respondents due process of law. The successive rulings of the trial court have the flavor of a game in which at each turn the respondents are the unfortunate losers. The Court of Appeals viewed these facts clearly and, in effect, held that the trial court could not deny class action status to the case and then refuse to grant timely applications for intervention, which it had invited, ostensibly because the statute of limitations had run in the meantime.

Petitioners argue that the Ninth Circuit's decision will "make the time period of every statute of limitation open ended with no discernible period of repose."[104] In fact, as petitioners themselves make clear, the only indefinite period in such case will be the time required by the trial court to determine whether the suit will be maintained as a class action. If the class fails, its members will have the same interval to file new actions or motions to intervene as remained between the date the class action was brought and the date the statute would have run. This is a discernible period.

Petitioners argue too that the decision will encourage the solicitation of claims by plaintiffs during the time the propriety of the class action is being decided.[105] In many class actions the solicitation of claimants is an abuse that the trial court must control. There is no reason, however, why the methods of control available to the trial court could not be employed during the period it is considering whether the class action should be main-

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[104] Petitioners' Brief for Certiorari at 17.

[105] Brief for Petitioners at 33; Petitioners' Brief for Certiorari at 24.

tained. The order prohibiting both parties from contacting members of the purported class,[106] which petitioners cite as evidence of the problem, would still be available.

Contrary to petitioners' assertions, the instant case is not an example of such abuse. The Attorney General of the State of Utah is its chief legal officer with responsibilities running to the state's inferior governmental entities.[107] He would be remiss in his duties if he failed to apprise these entities of their just claims.

There is no danger that the instant decision will "exacerbate the problem of over use and abuse of the class action device" or "encourage the filing of invalid as well as valid class actions."[108] It bears repeating in reply to these arguments that the decision is limited to cases denying the class action on the basis that the claims can be handled more efficiently through joinder and intervention. As the Circuit Court points out, the number of claimants in a purported class will rarely be so small that as matter of law Rule 23(a)(1) does not apply.[109] If the other requirements

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[106] Wright and Miller, Manual for Complex and Multidistrict Litigation, §§1.61-1.62 (1970 Ed.).

[107] *See* Utah Const. Art. VII, § 18; Utah Code Ann. § 67-5-1 (Repl. Vol. 1968). Commenting on the problem of solicitation as a possible abuse of the class action procedure, Professor Charles Alan Wright has noted that Attorneys General should be exempt from court rules on solicitation because of their constitutional and statutory duties to protect the various government bodies of their respective states.

> A local rule or order [*in re* solicitation] should exempt from its operation (1) communications between an attorney and a client or prospective client who has, on the initiative of the client or prospective client, consulted with, employed or proposed to employ the attorney; and (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresent the status, purposes or effects of the action or orders therein. Attorneys General are normally regarded as representing the political subdivisions of their own state and should be allowed relatively free discourse, in the public interest, with the Attorneys General and political subdivisions of other states. Wright and Miller, Manual for Complex and Multidistrict Litigation, p. 23 (1973 Ed.)

[108] Petitioners' Brief for Certiorari at 25.

[109] Petitioners' Brief for Certiorari, App. D at 38, n. 9; 473 F.2d at 584, n. 9.

of Rule 23(a) are met, then the problem of abuse and over use of the class action device is difficult to discern.

The chimerical problems of repose, solicitation, and abuse that petitioners see in the Court of Appeals' decision should be contrasted with the real problems that would arise from the district court's rule that claimants in respondents' position are barred. A contrary decision would put § 5(b) entirely within the discretion of the trial judge. If a class action is sustained, then, following the district court's reasoning, each member of it, including an ignorant member "sleeping on his claim," would be before the court with his action commenced before the statute had run. If the class is denied, even on the grounds that its members' claims could more efficiently and practicably be litigated through intervention, then the members of it, including those who stand ready to present their claims as intervenors, were never before the court and their claims are barred. The Court of Appeals concluded that to allow this result "would be to empower the court, through the discretionary determination of whether the suit had been commenced or not, to render the statute of limitations applicable or not, as is seen fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion."[110]

The Court of Appeals reasoned correctly that because "a civil matter is commenced by filing a complaint with the court," members of a class in respondents' position had satisfied the statute when the class action was filed.[111] If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed, *only because the trial court in its discretion wanted the*

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[110] *Id.*

[111] Petitioners' Brief for Certiorari, App. D at 36-39; 473 F.2d at 583-84.

claims presented in a different form of proceeding, it could not be said that the respondents were then never before the court, but only that they were out of court and again in exactly the same position as when the class action was filed. The decision of the Ninth Circuit is correct and should find proper application in the future consistent with the facts of other cases.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit is correct and should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General, State of Utah
State Capitol
Salt Lake City, Utah 84112

PRINCE, YEATES, WARD, MILLER
& GELDZAHLER
Gerald R. Miller
J. Rand Hirschi
Third Floor John Hancock Bldg.
455 South Third East
Salt Lake City, Utah 84111

MOCK, SHEARER & CARLING
Kent Shearer
Continental Bank Building
Salt Lake City, Utah 84101

Special Assistant
Attorneys General, State of Utah